M E M O R A N D U M

TO: Charles Campbell DATE: NOVEMBER 20, 1986

FROM: James Egan

SUBJECT: Obscenity, The Charter and "The Joy of Gay Sex"

In tactical terms, I believe our best chance of success lies squarely in the obscenity case law and only secondly in Charter Arguments. When all is said and done, the crux of our case rests on convincing the Divisional Court that The Joy of Gay Sex (hereinafter referred to as "JOGS") does not represent an undue exploitation of sex as considered tolerable by the community standard of all Canadians. The purpose of the work taken as a whole may also be relevant, but the court may, as in Re Winkler and Deputy Minister of National Revenue for Customs and Excise (1973) 15 C.C.C. (2d) 168 (Ont. Co. Ct.) consider that the pictures and illustrations were not necessary for a full appreciation and understanding of the text (the court found the pictures had no direct relationship to the text). However, the "undue" exploitation of sex was held to be properly measured against "the internal necessities of the book itself" in a later Ontario County Court case, R. v. MacMillan Co. (1977) 31 C.C.C. (2d) 286, which dealt with a sex education book.

I believe it is essential we establish that both the purpose of and the methods employed in JOGS are valid. Towards this end, a brief review of the law as it relates to obscenity may be helpful.

The Test for Obscenity

Prior to 1959, the judicial test for obscenity in Canada was that pronounced by Cackburn, C.J. in R. v. Hicklin (1868), L.R. 3 Q.B. 360. The "Hicklin test" (cited in Brodie v. The Queen, [1962] S.C.R. 681, 37 C.R. 120 at p. 141) inquired,

> whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.

As Dickson, C.J.C. noted in Towne Cinema Theatres Ltd. v. R., [1985] 1 S.C.R. 494 at p. 503, the "Hicklin test" has been criticized because of its focus on the reactions of the weakest and least capable members of the society, for its disregard of serious purpose or artistic merit in the impugned material and for its excessive dependence on subjective conjecture on the part of the trier of fact.

In 1959, Parliament amended the Criminal Code by including section 150(8) (presently s. 159(8)). The section now reads:

> 159(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, honor, cruelty and violence, shall be deemed to be obscene.

Section 159(8) provided a new standard for obscenity. in Dechow v. The Queen, [1978] 1 S.C.R. 951, 35 C.C.C. (2d) 22, the Supreme Court stated that the standard set out in this subsection is exhaustive where it applies and it excludes the application of the "Hicklin test". The new standard became one of "undue exploitation of sex". As Judson, J. stated in Brodie, supra at p. 141,

> There must be a characteristic which is dominant and this dominant characteristic must amount to an exploitation of sex which is undue. If any of these elements is missing, the charge fails.

This test was also applied in R. v. Ariadne Devs. Ltd. (1974) 19 C.C.C. (2d) 49 (N.S.C.A.), R. v. Great West News Ltd. (1970) 4 C.C.C. (2d) (Man. C.A.), R. v. Wagner (1986) 43 Alta. L.R. (2d) 204 (Alta. C.A.) and Re Gordon Magazine Enterprises Ltd. (1965) 46 C.R. 313 (Ont. C.A.). Another test, focusing on whether the publication was "immoral or indecent" was employed in Re North American News and Deputy Minister of National Revenue for Customs and Excise (1973) 1 O.R. (2d) 200 (Ont. Co. Ct.), R. v. Pink Triangle Press (1980) 51 C.C.C. (2d) 485 (Ont. C.A.) and formed the basis for the successful sec. 2(b) Charter appeal for vagueness in Luscher v. Deputy Minister, Revenue Canada, Customs and Excise (1985) 45 C.R. (3d) 81 (Fed. C.A.). The wording of Tariff Item 99201-1 now specifically refers to sec. 159(8) for its definition of obscenity, and the Brodie, supra test applies.

In Brodie, Judson, J. proposed two tests for objective application to determine whether the exploitation of sex has been undue. Both of these tests were cited with approval by Dickson, C.J.C., in Towne Cinema. The first test focused on the "internal necessities" of the work in question.

Judson, J., stated in Brodie, supra at p. 144:

> ...I do not think there is undue exploitation if there is not more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness...The section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary method and the quality of the work...must have a real relevance in determining not only a dominant characteristic but also whether there is undue exploitation.

As well, Judson, J., cautioned that the sections of the work in question must not be examined in isolation, but should be examined in the context of the work as a whole. At page 142 he states:

> It is not the particular passages and words in a certain context that are before the Court for judgment...The question is whether the (work) as a whole is obscene not whether certain passages and certain words, part of a larger work, are obscene.

Some cases, notably R. v. Penthouse International Ltd. (1979) 46 C.C.C. (2d) 111(n) (Ont. C.A.) leave to appeal to S.C.C. refused at 46 C.C.C. (2d) 111 have held that a magazine should be judged differently than a novel or "similar publication" in that a magazine has no central theme and therefore each page should be examined in isolation. In the case of R. v. Coles Book Stores Ltd. [1974] 6 W.W.R. 404 (Alta. S.C.), which dealt with The Joy of Sex the court held that while the book dealt "frankly and openly" with the subject of sex, the Crown had failed to discharge the onus of demonstrating that the purpose of the authors was "base exploitation of sex as opposed to a serious purpose."

The second test which Judson, J., enunciated in Brodie was the "community standards" test. This test looks to the standards of the community in determining whether the exploitation of sex is "undue". That which exceeds the community standards will be considered "undue" and will be deemed obscene by virtue of section 159(8).

The "community standards' test is the more frequently used of the two tests outlined in Brodie. In Towne Cinema, Dickson, C.J.C., considered this test in light of the

subsequent Canadian cases. He cited with approval Dominion News and Gifts (1962) Ltd. v. The Queen, [1964] S.C.R. 251, in which the Supreme Court adopted in toto the dissenting judgment of Freedman, J.A., of the Manitoba Court of Appeal ([1963] 2 C.C.C. 103). Freedman J.A. elaborated on several of the requisite characteristics of the community standards to be applied. He noted (at page 116) that "Community standards must be contemporary" because "Times change, and ideas change with them". He also held (at page 117) that "...we must determine what is obscene by Canadian standards, regardless of attitudes which prevail elsewhere". As to which contemporary Canadians are to be the focus for "community standards" Freedman J.A. stated (at page 116):

> Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste or habit of mind. Something approaching a general average of community thinking and feeling has to be discovered.

In Towne Cinema, Dickson C.J.S. also stressed that the contemporary Canadian community standards must be measured objectively, as was stated in R. v. Odeon Morton Theatres Ltd. (1974), 16 C.C.C. (2d) 185 (Manitoba C.A.) and R. v. Sudbury News Services Ltd. (1978), 39 C.C.C. (2d) 1 (Ontario C.A.). As Weatherston J.A. said in R. v. Penthouse International Ltd. supra at pp. 114-115:

> The question, in any event, is not whether the content of the publication goes beyond what the contemporary Canadian community thinks is right, but rather whether it goes beyond what the contemporary Canadian community is prepared to tolerate.

Chief Justice Dickson (Lamer and LeDain J.J. concurring, Beety, Estey and McIntyre J.J. concurring on this point) summarized the "community standards" test in Towne Cinema supra at page 508:

> The cases all emphasize that it is a standard of tolerance, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.

It should be noted that the Supreme Court of Canada in Germain v. The Queen (1985) 21 C.C.C. (3d) 289 did not consider the audience viewing a publication a relevant factor in whether it was obscene. In particular examples, while the court in R. v. Cinemas Quebecois Inc. (1982) R.L. 180 (C.M.M.) held that community standards must reflect the taste of "average citizens - those between prudish and lascivious", the Quebec Superior Court (Crim. Div.) in Re Priape Engr. et al and the Deputy Minister of National Revenue (1979) 52 C.C.C. (2d) 44 held that the community would consider a sexual act more obscene if performed by those of the same sex. In R. v. Doug Rankine Co. (1983) 36 C.R. (3d) 154 (Ont. Co. Ct.), however, the court held that scenes of both anal sex and fellatio would be tolerate by contemporary Canadian society.

Chief Justice Dickson was quick to point out that the "community standards" test was only one measure of whether the exploitation of sex was "undue". It was not the only measure. He noted that there may be publications that cause harm to some members of society, and thus to society as a whole. He held (at p. 505) that a legal definition of "undue" must also encompass such publications. The Chief Justice said:

> Sex related publications which portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment, may be "undue" for the purpose of s. 159(8). No one should be subject to the degradation and humiliation inherent in publications which link sex with violence, cruelty and other forms of dehumanizing treatment.

He stated further that such publications could be found to be obscene even if they were within the Canadian community's standard of tolerance:

> Even if certain sex related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example in the sense that they portray persons in a degrading manner a objects of violence, cruelty, or other forms of dehumanizing treatment.

The Current Test for Obscenity

To summarize, the current test for obscenity, as delineated in s.159(8) of the Code, states that any publication which as an undue exploitation of sex as a dominant characteristic will be deemed to be obscene. Judicial interpretation of s.159 has developed two independent tests for determining whether the exploitation of sex has been undue. The first, the "internal necessities" test focuses on the artist's purpose and the literary and artistic merit of the work in question to determine whether the exploitation of sex has been undue. The second, the "community standards" test, requires the trier of fact to objectively determine the contemporary Canadian community standards of tolerance, and then to evaluate whether the work in question hs exceeded those standards. The target audience of the work in question is not relevant in determining whether community standards have been

exceeded. Neither is it necessary that expert evidence be lead in order to demonstrate existing community standards, however, the trier of fact cannot reject such evidence with good reason.

I believe JOGS will survive a review of its merits under current obscenity law. When considered in context, for its serious purpose and quality, I believe it will be accepted under the current community standards test. It would be wise, however, to briefly examine our position under the Charter as well.

The Charter

The two issues which have consistently been raised in Charter challenges to obscenity legislation are: (a) whether the legislation constitutes a prima facie infringement of section 2(b), and (b) whether such legislation can be justified under section 1?

Most Canadian courts have been prepared to acknowledge that obscenity legislation does violate the freedom of expression guaranteed in section 2(b) (see R. v. Red Hot Video Ltd. (1985), 18 C.C.C. (3d) 1 (B.C.C.A.) and Re Information Retailers Association of Metropolitan Toronto (1985), 52 O.R. (2d) 449 (Ont. C.A.)), however the issue has not yet reached the Supreme Court. Very few courts have adopted the American approach and proclaimed that obscenity is not deserving of constitutional protection. As well the protection of freedom of expression has been held to apply to all phases of expression from the creator through to the supplier, distributor, retailer and receiver (R. v. Videoflicks Ltd. et al (1984), 48 O.R. (2d) 395 at 431).

While the courts have considered obscenity legislation a violation of section 2(b), they have consistently held it to be a reasonabl limit under section 1 (see R. v. Ramsingh et al (1984), 14 C.C.C. (3d) 230 (Man. Q.B.) and R. v. Wagner supra. It is important to remember however that all of these decisions were rendered before Chief Justice Dickson articulated the stringent test in R. v. Oakes (S.C.C.) for determining whether a limit on a right or freedom is reasonable and demonstrably justified.

Section 1 of the Charter requires that any limit on the freedom of expression be "prescribed by law". At the appeal court level it hs been determined that section 159(8) satisfies this criteria. In Red Hot Video, supra, the appellant argued that while the courts have held that "undueness" is to be determined by contemporary Canadian community standards, those standards are very difficult to delineate and thus the ordinary citizen does not know what constitutes an offence under s. 159(8). However, both Nemetz C.J.B.C. (Hickson J.A. concurring) and Anderson J.A. rejected this argument. Mr. Justice Anderson stated (at p.21):

> ...the definition enunciated by the Supreme Court of Canada, when read together with the decided cases, makes it possible for any person to ascertain with rasonable certainty whether the material to be published is or is not within the premises of s. 159(8).

As to whether s. 159(8) is a reasonable and demonstrably justified limit under section 1 of the Charter, Chief Justice Dickson has explained that the evaluation must take place in light of the Court's commitment to uphold the rights and freedoms in other sections of the Charter (R. v. Oakes, supra, p. 36). As well he notes that the words "free

and democratic society" refer the Court to the very purpose for which the Charter was entrenched; that Canadian society is to be free and democratic (p. 37). Some of the values and principles which the Chief Justice considers essential to a free and democratic society are:

> respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society (p. 37).

Chief Justice Dickson also recognizes that the rights and freedoms set out in the Charter are not absolute, and may need to be limited in order to achieve collective goals of fundamental importance. Section 1 places the onus upon the party seeking to impose a limit on a Charter right or freedom to show, on a balance of probabilities, that the limit is reasonable and demonstrably justified. The Court will want cogent and persuasive evidence on the consequences of imposing or not imposing the limit as well as on whether alternative measures were available for implementing the stated objective (pp. 39-40).

Perhaps the most important consideration for the courts in determining if sec. 159(8) should validly apply in a given situation will be the "proportionality" test described in R. v. Big M Drug Mark Ltd. [1985] 1 S.C.R. 295 (S.C.C.). The test embodied the following:

(a) the means used must be carefully constructed to achieve the objective in question;

(b) even if the means used are carefully tailored to the objective, they should impair as little as possible of the right or freedom;

(c) there must be a proportionality between the effects of the means which limit the right of freedom and the sufficiently important objective.

Deciding whether section 159(8) would satisfy the three components of the proportionality test may be difficult. The courts will be required to balance the interests of society against those of the individuals and groups who produce, distribut and consume pornography and obscenity. If the objective in question is to prohibit the publication of material which causes substantial harm to society, it may be that s. 159(8), with tis standard of "undue exploitation of sex", is not carefully constructed enough to achieve this objective. Or it may be that s. 159(8) prohibits not only material which causes substantial harm to society but also material which odes not and therefore s. 159(8) impairs more of the freedom of expression than is necessary to achieve it objective. Finally, the effects of s. 159(8) on an individual's or group's freedom of expression may be so sever that it will not bejustified by the objective of prohibiting the publication of material which causes substantial harm to society. Should section 159(8) (or any obscenity legislation) not satisfy any one of the components of the proportionality test it would be deemed inconsistent with section 2(b) of the Charter and thus of no force or effect.

In Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983) 45 O.R. (2d) 80(n) (Ont. C.A.), the requirement that a film be submitted to the Censor Board and possibly banned was considered a limitation on freedom of

expression, perhaps similar to censorship at the border. In Re University of Manitoba and Deputy Minister, Revenue Canada (1983) 4 D.L.R. (4th) 658 (Man. Co. Ct.), the banning of a sexually explicit film for medical students violated the faculty's freedom of expression.

In another view, the Ontario C.A. in R. v. Times Square Bookstore, supra held that sexually explicit material, so long as it is not obscene, is entitled to the same protection as other forms of expression. Once a publication is deemed not to be obscene, it can not be limited in circulation.

Conclusion

I have not found evidence of the courts "reading-down" obscenity definitions under the Charter. At best, the post-Charter decisions have reflected a more liberal interpretation of what community standards now entail.

As to sec. 15 arguments, the only promising avenue wuld be to resist the position of Re Priape, supra that sex is more obscene because it involves two men, a clear issue of discrimination. I find no foundation for extending sec. 15 into non-enumeration discrimination.

I believe our best chance of success with Charter arguments lies in sec. 2(b) and sec. 1, stressing the rights of the homosexual community to a sex manual similar to The Joy of Sex, and arguing that any attempt to ban such a publication is not proportional to safeguarding the rights involved.

For further reference, I draw your attention to the following:

Coons, W.H. and Patricia A. MacFarland, "Obscenity and Community Tolerance" in Canadian Psychology, 1985 26: 1, p. 30.

Getz, Leon, "The Problem of Obscenity" (1965) University of British Columbia Law Review, Vol. 2, p. 216.

MacDonald, Michael, "Obscenity, Censorship and Freedom of Expression: Does the Charter Protect Pornography?" (1985) University of Toronto Law Review, Fall, p. 130.

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